LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 11 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 575.

JAMES R. SEWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

RALPH RUDD,
33 Public Square Bldg.,
Cleveland, Ohio,
Attorney for Petitioner.

JERRY GORDON,
1732 Standard Bldg.,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions in the Courts Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 2

The Constitutional and Statutory Provisions Involved 3

Statement of the Case ---------- 5

Reasons for Granting the Writ ---------- 11

I. The identification procedure used against petitioner was patently offensive to due process imperatives. Approval of that procedure by Ohio's state courts cannot be reconciled with relevant rulings by this Court ---------- 11

II. The question of whether an accused has a right under the due process and equal protection clauses of the Fourteenth Amendment to a preliminary examination once the examination had begun and before indictment by a Grand Jury warrants determination by this Court ---------- 13

III. The denial of petitioner's discovery motion raises important issues concerning the applicability of the Jencks rule to state proceedings and the extent to which a defendant may discover exculpatory material in possession of the state ---------- 15

Conclusion ---------- 16

Appendix:

Assignments of Error in Defendant's Brief Filed With the Court of Appeals of Ohio, Eighth Appellate District ---------- 17

Journal Entry of the Court of Appeals ---------- 18

Order of the Supreme Court of Ohio Dismissing Appeal ---------- 18

Order of the Supreme Court of Ohio Overruling Motion for Leave to Appeal ---------- 19

Mandate of the Supreme Court of Ohio ---------- 19

Transcript of Proceedings, Defendant's Preliminary Examination, Cleveland Heights Municipal Court, July 11, 1966 ---------- 19

TABLE OF AUTHORITIES.

Cases.

Brady v. Maryland, 373 U.S. 83 (1963) ---------- 15

Cox v. Louisiana, 379 U.S. 536 (1965) ---------- 14

Douglas v. Alabama, 380 U.S. 415 (1965) ---------- 14

Foster v. California, ---- U.S. ---- 89 S. Ct. 1127 (1969) ----------10, 12

Giles v. Maryland, 386 U.S. 66 (1968) ---------- 15

Griffin v. Illinois, 351 U.S. 12 (1956) ---------- 14

Harrison v. U.S., 392 U.S. 219 (1968) ---------- 13

Jencks v. United States, 353 U.S. 657 (1957) ---------- 15

Palmer v. Peyton, 359 F.2d 199 (C.A. 4th Cir. 1966) 12

Pointer v. Texas, 380 U.S. 400 (1965) ---------- 14

Rogers v. Richmond, 365 U.S. 534 (1961) ---------- 16

Ross v. Sirica, 380 F.2d 557 (D.C. Cir. 1967) ---------- 13

State v. White, 15 Ohio St. 2d 146, 239 N.E.2d 65 ---- 15

State v. Wilkinson, 17 Ohio St. 2d 9, 244 N.E.2d 480 (1969) ---------- 13

Stovall v. Denno, 388 U.S. 293 (1967) ---------- 11

Wheeler v. Flood, 269 F. Supp. 194 (D.C. E.D. N.Y. 1967) ---------- 13

Constitution and Statutes.

Constitution of the United States:

Fourteenth Amendment 3, 10, 13, 14, 15

Ohio Revised Code:

Sec. 2907.081 ..... 3, 5

Sec. 2937.10 ..... 4, 13

Sec. 2937.11 ..... 4, 14

28 U.S.C. 1257(3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

JAMES R. SEWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioner, James R. Sewell, asks that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on May 21, 1969 (App. p. 18) denying petitioner's motions for appeal of right and for leave to appeal. A motion for reconsideration was denied on June 18, 1969 (App. p. 18). The consequence of the denial of these motions was the affirmance of the judgment of the Ohio Court of Appeals which had sustained the conviction of this petitioner who had been found guilty by a jury and sentenced in the Court of Common Pleas for Cuyahoga County, Ohio.

OPINIONS IN THE COURTS BELOW.

Neither the Court of Common Pleas of Cuyahoga County, the Court of Appeals for the Eighth Appellate District of Ohio nor the Supreme Court of Ohio wrote an opinion in this case. The relevant entries from each court are reproduced in Appendix pp. 18-19.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on June 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Petitioner claims his conviction was acquired in violation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED.

I.

Whether petitioner's right to Due Process of Law was violated when identification testimony allegedly linking him to a crime was held admissible as evidence despite the following preceding events:

a. *Petitioner was arrested by police hours after the* commission of the crime and in an area far removed from the site of the crime.

b. Persons claiming to have seen the crime were summoned to the police station to view petitioner in a *one man lineup.*

c. This one-person viewing was conducted *before* any multi-man lineup.

d. The viewing was conducted in the absence of counsel for the accused.

II.

Whether petitioner was denied Due Process of Law and Equal Protection of the Laws, when, in the middle of his preliminary hearing and over his objection, the hearing was interrupted at the request of the State and never resumed.

III.

Whether petitioner was denied Due Process of Law when he was denied access to documents, tapes, records, transcriptions, grand jury minutes, witnesses' statements and other possibly exculpatory matter in the possession of the prosecution.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment XIV:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes.

The relevant portions of the pertinent Ohio Statutes involved are:

Section 2907.081, Ohio Revised Code:

No person shall maliciously, with intent to cause damage or injury to any person or property, place or explode, or cause to be placed or exploded, a bomb or any explosive as defined in division (A) of section 3743.01 of the Revised Code. "Bomb" or "explosive" as used in this section does not include fireworks as defined in section 3743.27 of the Revised Code.

Whoever violates this section shall be fined not less than one thousand nor more than ten thousand dollars

and shall be imprisoned not less than ten nor more than twenty years.

Section 2937.10, Ohio Revised Code:

If the charge be a felony and there be no written plea of guilty or waiver of examination, or the court or magistrate refuses to receive such waiver, the court or magistrate, with the consent of the prosecutor and the accused, may set the matter for hearing forthwith, otherwise he shall set the matter for hearing at a fixed time in the future and shall notify both prosecutor and defendant promptly of such time of hearing.

Section 2937.11, Ohio Revised Code:

At the preliminary hearing, pursuant to section 2937.10 of the Revised Code, the prosecutor may, but shall not be required to, state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state, under the rules of evidence prevailing in criminal trials generally, the accused and the magistrate having full right of cross examination and the accused the right of inspection of exhibits prior to their introduction. On motion of either the state or the accused, witnesses shall be separated and not permitted in the hearing room except when called to testify.

STATEMENT OF THE CASE.

The defendant was convicted in the Court of Common Pleas of Cuyahoga County, Ohio, on September 22, 1967, of violating Section 2907.081, Ohio Revised Code (placing a bomb). He was sentenced to a term of 10 to 20 years in the Ohio State Penitentiary, where he is presently incarcerated.

At or about midnight on June 27, 1966, an explosion occurred at a house at 2604 East Overlook in Cleveland Heights, Ohio. The State's evidence was that a group of college students, all under 21, were having a party next door; that just prior to the explosion they heard the noise of breaking glass; that five of them ran from the back of the next door house to the front, in the direction of the sound; that they caught a fleeting glimpse of a man running across the lawn of the 2604 address; that they saw him drive off in a car; that one of the young people saw the entire license number of the man's car (others said they saw only particular numbers or letters); and that she called the number out (R. 214, App. p. 26); that the number was written down (R. 237, 302, App. pp. 27, 30); that shortly thereafter the explosion occurred; that the police were immediately called to the scene (R. 614, App. p. 32); that they traced the license number to defendant; and that hours later they arrested the defendant at his home and brought him to the Cleveland Heights police station.

At about 6 a.m. the following morning the five young people who claimed to have seen the man running across the lawn were called to the Cleveland Heights Police Station where the defendant was being held in custody. They were asked to look at the automobile belonging to the defendant, the only automobile shown them. They were then taken to a room in the police station which had a window allowing a clear view of the adjoining police park-

ing lot. *All 5 were placed in the room at the same time* and told to look out the window. One of the State's witnesses, Brent Murphy, testified that he observed "one officer and one man just walking across the parking lot." This colloquy followed:

> "Q. And what did you do then?
> A. *A police officer asked me if that looked like the man that I had seen that night.*
> Q. Were you able to identify that man?
> A. Yes, sir. Later on that day he was put in a lineup." (R. 291, App. p. 28. Emphasis added.)

The accused testified, and the State did not deny, that the policeman pulled a gun on him while he was being paraded in the parking lot, which was 15 or 20 feet away from the room in which the students had been placed (R. 496, 497, App. p. 32). Defendant Sewell was wearing a green shirt and white tennis shoes. There were no other persons in the parking lot area during this one-man lineup. The students viewed the defendant in this posture for a period estimated by one to be 45 seconds and by another to be for 30 seconds. All agreed the parking lot was well lighted.

Four of the five students testified for the State. One witness, Camilla Burby, testified that the man she saw in the parking lot looked much older than the man she had seen at the house the night before (R. 230, App. p. 26). Another eyewitness estimated the age of the man running from the house as being 58 or 59 (R. 320, App. p. 30). The accused had just turned 46 at the time of the incident. A third witness quoted herself as making a tentative identification during the parking lot episode (R. 125, App. p. 25).

Sometime after the defendant (plus the uniformed policeman) had been paraded alone in the parking lot in

broad daylight, he was put in multi-man lineups to be again viewed by the young people. Defendant Sewell was dressed in the same green shirt for these lineups and he was the only man in them who had been previewed. *Both the one-man lineup and the multi-man lineups were conducted in the absence of counsel, in spite of defendant's repeated requests for an attorney* (R. 19, App. p. 24).

The witnesses varied in their accounts of the amount of time that they were able to see the face of the man who ran across the lawn of the house where the explosion occurred and whom they later claimed to identify as defendant Sewell. These variances ran from one to seven seconds. All witnesses disclaimed having seen the man in question before. At the police station the young people did identify the accused as the man they had seen running from the scene of the explosion. But this identification was made only *after* the parking lot exhibition of the accused and the subsequent placing of him in a lineup in the same green shirt.

At trial the four young people identified the defendant as the man they had seen on June 27, 1966, running from the East Overlook house. All the witnesses were certain that the man they saw running wore glasses. The undisputed evidence is that the defendant never wore glasses except for reading and that he had on no occasion worn glasses while driving.

Defendant Sewell's license plate bore the number RV 840. That is the number witness Camilla Burby claims to have called out as the car was driving away from the scene. The State's witnesses testified that this number was written down (R. 237, 302, 343, App. pp. 27, 30, 31). *Camilla Burby expressly stated she saw the number written down* (R. 237, App. p. 27). Yet no document containing this writing was ever produced in evidence by the

State. In fact a police officer denied that the license number was written down when he arrived at the scene (R. 619, App. p. 33).

It took the police several hours from the time of their arrival at the East Overlook home when they allegedly got defendant's license number until they arrested defendant and brought him and his car to the Cleveland Heights police station.

The sequence of events is shown as follows:

12:18 a.m. Police first notified of explosion (R. 614, App. p. 32).

12:25 a.m. Estimated time police arrived and allegedly got defendant's license number (R. 614, App. p. 33).

3:40 a.m. Time police testified they got defendant's address (R. 626, App. p. 34).

5:30 a.m. Defendant arrested (R. 40, App. p. 24). [Police testimony was later changed to set the time as 4:30 a.m. (R. 611, App. p. 32)].

It took *20 minutes* to drive to defendant's home (R. 638, App. pp. 34-35).

The number RV 840 appears in a license directory owned by Cleveland Heights Police (R. 621, App. p. 33). The name of the owner of those plates could be determined in a matter of minutes from that directory (R. 624, App. p. 34). *Defendant's name was correctly listed* but the address was shown as 37850 Midland Drive, Willoughby, Ohio (State's Ex. 14), rather than 37850 Milann Drive, Willoughby Hills, where he resided (State's Ex. 13). There is no such street as Midland Drive in Willoughby, a fact which the police determined *without spending time going to a wrong address* (R. 626-627, App. p. 34). The Cleveland Heights police did talk to the Willoughby police (R. 627, App. p. 34) (Willoughby is adjacent to Willoughby

Hills (R. 644)) and could have gotten defendant's correct address from the telephone directory in a matter of seconds.[1] Yet, it took 4 to 5 hours to arrest defendant.

The style and model of the car observed at the scene of the explosion was said to be a Comet by one of the two male eyewitnesses and a Tempest by the other (R. 348-349; 350; 299-301, App. pp. 31, 28-29). These opinions were expressed in an interview conducted months before defendant's trial and recorded by a court reporter. The young man who argued the car was a Comet claimed to know Comets and was certain that this was the make of the car he had observed leaving the East Overlook house. In fact defendant's car was neither a Comet nor a Tempest but rather a Chevrolet (State's Ex. 13). There was no positive identification of the car until it was pointed out at the police station by the police.

Defendant emphatically denied any connection with the explosion. His testimony was that on the night in question he had driven from his home in Willoughby Hills to visit his step-son; that the latter was not at home and that he then returned to Willoughby Hills. He testified that at no time was he anywhere in the East Overlook neighborhood.

Defendant was given a preliminary examination, as required by the Ohio statutes, while still a prisoner in the Cleveland Heights jail. However, in the middle of the examination counsel for the City of Cleveland Heights asked permission to make a call downtown, which was granted, and thereafter asked for a continuance of the preliminary hearing which was granted over the objection of defense counsel (App. p. 20). As predicted by counsel at that

---

[1] Defendant's name and address were listed in the Willoughby-Painesville Directory on page 121 as:

James R. Sewell 37850 Milann Dr. 946-3806.

time, the preliminary hearing was never reconvened. A timely objection to this failure to provide the preliminary hearing was made and overruled (R. 4-6; 88, App. pp. 22, 25).

On April 14, 1967, or five months before trial, defendant filed a written motion to suppress line-up identification in which he contended that "A compulsory single line-up accompanied by identifying actions—all in the absence of counsel—violates the defendant's Fifth, Sixth, and Fourteenth Amendment rights protected by the United States Constitution." The motion, which was repeatedly renewed at trial, was denied. (R. 86-87, App. p. 25). Defendant also moved and renewed a motion to see the statements of witnesses, reports and any other evidence which might have been exculpatory of the defendant, including grand jury minutes. These motions which are predicated on constitutional Due Process grounds, were similarly denied. (R. 3, 8-10, App. pp. 21, 23-24). Witness Burby claimed to have made notes of the crucial events and given them to the police (R. 236, App. p. 26). Access to such notes was denied by the Trial Court (R. 260-261).

In his appeal to the Ohio Court of Appeals, Eighth Appellate District, defendant raised federal constitutional questions as indicated above (App. 17). The arguments were reiterated in the appeal to the Ohio Supreme Court (defendant's Memorandum in Support of Jurisdiction, pp. 12-16, 19).

Prior to oral argument in the Ohio Supreme Court, this Court announced its decision in *Foster v. California*, ____ U.S. ____ 89 S. Ct. 1127 (1969). A copy of the opinion in that case was submitted to the Court. Nevertheless, full review was denied on the ground that "no substantial constitutional question exists herein."

REASONS FOR GRANTING THE WRIT.

I.

The identification procedure used against petitioner was patently offensive to due process imperatives. Approval of that procedure by Ohio's state courts cannot be reconciled with relevant rulings by this Court.

When an accused—arrested hours after and miles away from the commission of a crime—is subjected to a one-man lineup by police, before five persons who are together during the viewing, all in the absence of an attorney, the result is a procedure which so brazenly and outrageously violates the most fundamental norms of Due Process of Law as to vitiate any conviction obtained as a result. That Ohio's state courts failed to reach such a conclusion reveals a recalcitrance to honor this Court's clear pronouncements on the subject.

It is true that *Stovall v. Denno*, 388 U.S. 293 (1967) denies retroactivity to the rule requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of counsel. The holding has prospective application from June 12, 1967, and the confrontation here occurred nearly a year before that date. *Stovall*, however, makes clear that if the confrontation is "so unnecessarily suggestive and conducive to irreparable mistaken identification" [2] a defendant is denied due process, irrespective of any right to counsel claim. Among those procedures inimical to due process,

> The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.[3]

---

[2] *Id.* at 302.

[3] *Id.* at 302.

A conviction secured following a one-man viewing cannot stand. Cf. *Palmer v. Peyton,* 359 F.2d 199 (C.A. 4th Cir. 1966) (only one voice heard).

The "totality of the circumstances" rule which preexisted *Stovall* supplies the warrant for review here. Cf. *Foster v. California,* ____ U.S. ____, 89 S Ct. 1127 (1969), where the identification procedure used by police, while constitutionally indefensible, was infinitely superior to the treatment accorded this petitioner.

In the instant case, police had talked to the eyewitnesses at the scene and received a description of the suspect. If there were any firm basis for identifying petitioner as the guilty party, there would have been no necessity for the officers to resort to the extraordinary parking lot exhibition. This fact coupled with the uncertainties expressed by the viewers during the one-man lineup—which uncertainties were fully erased by the time of trial, thanks to the suggestive techniques employed by the police—raises substantial questions as to the validity of the identification and the guilt of petitioner.

The constitutional infirmity of the identification procedure cannot be discounted because of the alleged connection of the license plate number to defendant. Leaving aside for the moment the unanswered inquiries about that number (i.e., the failure of the State to introduce the writing which supposedly contained it and the several hours delay in arresting defendant after the license number was allegedly traced to him) *the State offered no evidence that the defendant was in his car during the night in question.* Only after the State's witnesses were permitted to testify to the parking lot identification and to repeat their identification of defendant in the courtroom did defendant take the stand and testify that he drove the car earlier in the evening, arriving home an hour before

the explosion 20 miles away. Under the principle announced in *Harrison v. U.S.*, 392 U.S. 219 (1968), the license plate evidence is a tenuous link to defendant except in the most limited circumstantial sense. If the identification evidence had been suppressed, as it should have been, no substantive basis would have existed to try, much less convict, petitioner.

This Court has established rules defining minimum standards of due process in the administration of justice. A writ should issue here to secure compliance with those rules in the face of State judicial unconcern. As a collateral proposition, petitioner's constitutional right to be fairly tried and fairly judged should be protected.

II.

The question of whether an accused has a right under the due process and equal protection clauses of the Fourteenth Amendment to a preliminary examination once the examination had begun and before indictment by a Grand Jury warrants determination by this Court.

A preliminary examination is not only required by the language of Section 2937.10, Ohio Revised Code, but is an important discovery device as well. Cf. *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967); *Wheeler v. Flood*, 269 F. Supp. 194 (D.C. E.D. N.Y. 1967).

The Ohio Supreme Court recently ruled that:

> "A preliminary examination is not required where there is an indictment on the charge for which defendant was arrested."

State v. Wilkinson, 17 Ohio St. 2d 9, 244 N.E.2d 480 (1969), paragraph 1 of the syllabus. Here there was no indictment; yet, over petitioner's objection and during

cross-examination of the State's one witness, the examination was adjourned never to be resumed. The prosecution's maneuver, transparently designed to circumvent petitioner's right to a full preliminary examination, raises serious due process questions which need resolution. Involved is the right to cross-examination, which has been accorded constitutional status, *Pointer v. Texas,* 380 U.S. 400, 403 (1965); *Douglas v. Alabama,* 380 U.S. 415, 418 (1965), under circumstances where direct examination was completed in a preliminary hearing.[4]

There is the further issue of whether denial of a full preliminary hearing constituted an invidious discrimination contrary to the Equal Protection clause of the Fourteenth Amendment. Other defendants receive full preliminary examinations with the right of cross-examination and as long as that is the case petitioner is entitled to the same quality of justice. The prosecutor should not be permitted to pick and choose which persons accused of crime shall be accorded authentic preliminary hearings and which shall not. Cf. *Cox v. Louisiana,* 379 U.S. 536, 558 (1965), Mr. Justice Black, concurring; *Griffin v. Illinois,* 351 U.S. 12, 18 (1956).

---

[4] See also Section 2937.11, Ohio Revised Code, which expressly assures the "full right of cross examination" at a preliminary hearing.

III.

The denial of petitioner's discovery motion raises important issues concerning the applicability of the Jencks rule to state proceedings and the extent to which a defendant may discover exculpatory material in possession of the state.

In 1968, the Ohio Supreme Court held in *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65, that a defendant has the right to an *in camera* inspection by the trial court to determine the existence of inconsistencies between the testimony of the prosecution's witnesses and their prior statements. Counsel for the defense may be present and participate in such an inspection.

Petitioner's trial was in 1967. He asked for but was not permitted to see statements and notes of witnesses; nor was he allowed to examine other evidence, including grand jury minutes, which might have been exculpatory. In denying review, the Ohio Supreme Court in effect refused to give the *White* ruling retrospective application.

This case affords the Court an opportunity to determine whether it is obligatory upon the States, through the Due Process Clause of the Fourteenth Amendment, to afford defendants the discovery rights embodied in the Jencks rule, *Jencks v. United States*, 353 U.S. 657 (1957); 18 U.S.C. § 3500 (1957). A denial of access to exculpatory evidence does not differ materially from suppression. Cf. *Brady v. Maryland*, 373 U.S. 83 (1963). The crucial consideration is the *effect* of the absence of the evidence even where the testimony may be relevant only to the credibility of a witness. See *Giles v. Maryland*, 386 U.S. 66, 74 (1968).

CONCLUSION.

In *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) this Court held that where evidence (a confession) obtained by constitutionally impermissible methods is admitted in evidence, a conviction cannot stand *even where there is independent corroborating evidence.* In the subject case, there is no "independent corroborating evidence" to sustain the tainted identification testimony but even if there were the procedures used were so grossly violative of Due Process rights as to vitiate any conviction obtained through their employment.

The writ should issue to provide the Court an opportunity to examine the State of Ohio's stewardship of federal constitutional standards, to reaffirm existing standards, to buttress them by explaining and demonstrating new applications to prevent circumvention and, incidentally, to prevent petitioner's conviction in a trial conducted under conditions that flout Due Process of law.

Respectfully submitted,

RALPH RUDD,
Counsel for Petitioner.

Of Counsel:
JERRY GORDON.

APPENDIX.

ASSIGNMENTS OF ERROR IN DEFENDANT'S BRIEF FILED WITH THE COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT.

Assignment of Error No. 1.

The Court below erred and erring denied the accused Due Process of Law contrary to the Fourteenth Amendment to the United States Constitution when it refused to suppress illegally acquired identification evidence, including line-up evidence, and allowed "in court" identification based on a one man line-up—all in the absence of counsel.

Assignment of Error No. 2.

The Court below erred and erring denied the accused Due Process and Equal Protection of Law contrary to the Fourteenth Amendment to the United States Constitution when it denied a motion to dismiss the indictment for failure to accord the accused the preliminary hearing mandated by statute and begun, but adjourned and never reconvened, before the indictment of the accused thus depriving him of a statutory discovery device accorded other persons accused of crime.

Assignment of Error No. 5.

The Court below erred and erring denied the accused Due Process of Law contrary to the Fourteenth Amendment to the United States Constitution when his original motions (and renewals) for the production of documents, tapes, records, transcriptions, statements, and grand jury minutes were denied, and particularly when the statements of State's witnesses demanded for use on cross-examination were denied.

JOURNAL ENTRY OF THE COURT OF APPEALS.

December 12, 1968.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of the appellant its costs herein expended.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL.

(Entered May 21, 1969.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL.

(Entered May 21, 1969.)

It is ordered by the Court that this motion is overruled.

MANDATE OF THE SUPREME COURT OF OHIO.

(Entered May 21, 1969.)

To the Honorable Common Pleas Court

Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(Entered June 18, 1969.)

It is ordered by the court that rehearing in this case is denied.

TRANSCRIPT OF PROCEEDINGS, DEFENDANT'S PRELIMINARY EXAMINATION, CLEVELAND HEIGHTS MUNICIPAL COURT, JULY 11, 1966.

Note: Direct examination of the State's witness Camilla Burby had concluded and cross-examination was proceeding when the following occurred:

[Preliminary **(R. 18)**] Mr. Jaffe: (Appearing for the State): Your Honor, may I have a short recess?

[Preliminary (R. 19)] The Court: Well, we can not continue cross-examination without your presence.

Mr. Jaffe: This will only take thirty seconds.

The Court: Please make it short.

(At this point there was a short delay while waiting for Mr. Jaffe's return.)

Mr. Jaffe: At the request of the Assistant County Prosecutor, Mr. Frey, on behalf of Mr. Corrigan, I have been requested to ask the Court to grant us a one week continuance on this matter, inasmuch as I am sure that the Court is aware that the prosecution in this case has a great deal of relevancy. Should there eventually be a finding of probable cause, it would be tried by the County Prosecutor, and I have been asked that we get a seven day continuance.

The Court: What is your request?

Mr. Jaffe: I would have to comply, on their behalf.

Mr. Day: I object to the motion, for the reasons which I am sure are [Preliminary (R. 20)] obvious to the Court. I object because we have now undertaken preliminary examination and is quite apparent to me that in light of the practice of the prosecution downtown, that what they hope to do in the interim would be to take the case to the Grand Jury and prevent a preliminary hearing.

Mr. Jaffe: I object to that. Mr. Day is implying that.

Mr. Day: I do not imply this, I assert it.

The Court: The objection is sustained. Your objection is based purely on supposition. I am sure you will agree to that.

Mr. Day: I object to the motion and sustain it—or support it, with a constitutional argument. Although it may be appropriate to go directly to the Grand Jury as the prime route rather than the preliminary hearing and then to the Grand Jury, having been started in one court,

it is a violation of the 14th amendment of the United States Constitution if in midstream you stop the preliminary hearing and postpone it, particularly if it should come about that there [Preliminary **(R. 21)**] should be a direct indictment by the Grand Jury in the meantime.

Mr. Jaffe: Your Honor, again, with all due respect to the Court and Mr. Day, I think Mr. Day is entering into another area of supposition, in the matter that it may or may not go to the Grand Jury. I point out that there has been one continuance and I believe that the County Prosecutor's Office is an interested party in the proceedings of this Court even though, for the record, I am counsel.

The Court: Certainly I would not deny the accused the right to a continuance. The Revised Code of the State of Ohio provides that matters such as preliminary examination must be brought to the Court within ten days or the accused shall be released from custody. The record shows that in this case the accused requested a continuance until this date. That right to a continuance which belongs to the accused also is a matter of right for the prosecution. Your request is granted, Mr. Jaffe. This matter will be continued until Monday, July 18th, at 11:00 a.m.

* * * * *

(3) The Court:

Mr. Day, I understand you have some motions for the Court to consider.

Mr. Day: Yes, sir, I do. I have two that were previously filed, and as I understand it have been ruled on. At least I am so advised. I don't know that I got the notice involving the motion for production of documents, tapes, records, transcriptions, statements and Grand Jury minutes for inspection and copy, or, in the alternative, to dismiss.

Another one is a motion to suppress and the material for which suppression was sought and is sought is lineup identification.

(4) Mr. Day: I also have a motion which I made at the time of preliminary hearing and which I now renew. This motion is a motion to dismiss, on the ground that a preliminary hearing was begun and then in the middle of the hearing, as facts began to unfold, a recess called and a continuance granted over my objection, on the ground that we have never again been back for a preliminary hearing, at which point the record will show, and I have the record here—I will, if the Court wishes, at the proper time I will put the record in shape on that point.

Unless it is conceded, and I don't need to do it, I made the objection that we would never again have a preliminary hearing. The State would go directly to the Grand Jury and would indict this man, thus depriving him of the preliminary hearing. And that was overruled, on the ground of conjecture.

Now is the fact that he has been indicted. There was never any continued hearing on (5) preliminary hearing, and I count this as a violation of due process of law.

* * * * *

The Court: All right. (6) This Court feels then that this defendant was not deprived of any due process in the Magistrate Court under the facts as stated by defendant's counsel. If he was charged in a preliminary hearing, and a preliminary hearing begun, and if this preliminary hearing was continued to some later date and subsequently the warrant and affidavit for the arrest of that defendant in that Magistrate Court was dismissed, then that defendant was not deprived of his preliminary hearing. For this Court to rule at this time that he was deprived of a pre-

liminary hearing, or there is nothing or was nothing before the Magistrate Court, that seems to be inconsistent.

Your motion will be denied.

* * * * *

(8) Mr. Day: Yes, sir. I renew the motion for a discovery, and for all the obvious reasons. A lawyer likes to know as much about his case before he starts as he can.

(Argument had.)

The Court: Doesn't the whole system lend itself to the fact that everything that is pertinent to a trial is supposed to be brought out by both the State and the counsel for defense?

Mr. Day: Yes.

The Court: All of the facts are supposed to be laid before the trier.

Mr. Day: That is right. I am suggesting that all the facts are not, unless we know what kind of statements they have from witnesses. That is the point.

The Court: Anything (9) further?

Mr. Coyne: Nothing further, your Honor.

The Court: Mr. Day?

Mr. Day: Then I make a proffer to support my motion.

The Court: Make a proffer of what?

Mr. Day: Of what the evidence would show if I were allowed to put the prosecutor on the stand.

The Court: No, the Court will not allow you. Normally, the Court would permit a proffer of anything but not a proffer of what the prosecutor might say if you were permitted to call him.

Mr. Day: May I call Detective Gordon to ask him whether he took statements from the witnesses in this case?

The Court: You want to call Detective Gordon in the course of your motion for discovery?

Mr. Day: That is right, sir.

Mr. Coyne: Your Honor (10) I object to that.

(Argument had.)

The Court: The request to call the detective will be denied. The Court is going to overrule your motion.

* * * * *

JAMES R. SEWELL.

(19) Q. And all of the time that you are testifying about with respect to lineups was the time that are on occasions during which you were in the Cleveland Heights jail?

A. That is the only time I was in lineups, in Cleveland Heights.

Q. Had you in the meantime been demanding to see a lawyer?

A. All the time, and they kept on telling me that I would be able to use the telephone. And they come around about every 25 minutes to an hour. This was continued on for hours, and I was never allowed to see that telephone.

* * * * *

CAPTAIN EARL GORDON.

(40) Q. Do you know at this time what time it was when you made the arrest?

A. Yes, sir.

Q. What time was it?

A. Approximately 5:30 a.m.

Q. And where were you at the time?

A. In the living room of his home.

* * * * *

(86) The Court: At this time the Court is going to overrule the motion (87) to suppress the lineups, by the defense, * * *

* * * * *

(88) Mr. Day: Your Honor, I offer the transcript of the proceedings in the preliminary hearing in support of my motion, in that connection with the motion to dismiss.

* * * * *

MICHELLE DAY.

(114) Q. Now, the man that you saw run from in front of the Gard home on the early morning hours of June 28, 1966, do you see him in court today?

A. Yes.

Q. Would you point him out for the jury, please?

(115) A. This one, this man right there.

Q. Which man are you referring to?

A. The second man.

Mr. Coyne: May the record indicate that she has identified the defendant James Sewell?

* * * * *

(125) Q. Now, what did you say to the policeman who said, "Look out the window," if anything?

A. I said, "That seems to be the man we saw last night."

* * * * *

CAMILLA BURBY.

(213) Q. What, if anything, did you do then?

A. Well, I continued to chase the car up the street (214) until I got close enough to see the license number.

Q. Do you recall what that license number was?

A. Yes, I do.

Q. What is that?

A. RV 840.

Q. What did you do when you saw this license number?

A. I called it out.

* * * * *

(222) Mr. Day: If your Honor please, this is a point at which I do renew my motion for the suppression of the identification. But I have a suggestion to make which I think will avoid my asking for a voir dire on this. And that is just this; if I reserve the right to raise the impropriety of the in court identification and it is still cross-examination on the out of court lineups and viewings then I don't have to ask for voir dire out of the presence of the jury if I can know now that the Court will tell me that I can reserve that right on the motion itself. Do I make myself clear?

In other words, I would do here what I did with the other girl outside the presence of the jury. But I reserve my rights.

The Court: Let the record show that the rights are reserved to raise this question.

CAMILLA BURBY.

(230) Q. You said he looked much younger when you saw him at that time?

A. Yes.

Q. Did you not?

A. That's right.

Q. He looked much younger at the police station or much younger under the light?

A. Much younger under the light.

(236) Q. Now, I think I asked, but let me ask it again. You made some notes of the events, is that right?

A. I think it was just notes of—it was just a description that I made notes of.

Q. Description of what?

A. Of the man and of the car.

Q. Where are those notes now?

A. I have no idea.

Q. What did you do with them?

A. I gave them to the police.

* * * * *

(237) A. * * * So as soon as I got the license number and yelled it out, I was coming—I was probably either walking very fast or running back to the driveway.

Q. You are still in the street?

A. Yes.

Q. How soon after that did you write down the license number?

A. I think I told it to Brent Murphy, and he wrote it down. As soon as the—like the minute that the explosion went off and people were running in all directions and one girl was very upset, I told Brent the number. And I believe either he or Marty had a pencil and wrote that number down.

Q. Did you see them write it down?

A. Did I see them write it down?

Q. Yes.

A. Yes.

* * * * *

(260) Mr. Day: I move the Court for the production of those notes at this time.

(261) The Court: She hasn't said that she has ever used them.

Mr. Day: They were contemporary notes and she is testifying from a year's time. They can be very pertinent to the credibility of the witness.

She doesn't remember what she said less than a year ago. My motion is for the production of those notes.

The Court: Do you have anything to say about that?

Mr. Coyne: Only that I would object for the production of the notes. She certainly hasn't refreshed her recollection from them.

The Court: All right, the request will be denied.

* * * * *

BRENT MURPHY.

(291) Q. After you viewed the automobile what next did you do?

A. Well, we walked into a little room inside the station and we were asked by a police officer to look out a window.

Q. Did you look out that window?

A. Yes, sir.

Q. What, if anything, did you observe?

A. I saw one officer and one man just walking across the parking lot.

Q. And what did you do then?

A. A police officer asked me if that looked like the man that I had seen that night.

Q. Were you able to identify that man?

A. Yes, sir. Later on that day he was put in a lineup.

BRENT MURPHY, CROSS.

(299) Q. Did you ever at any time have a bet or a little contest on with Mr. Mullin as to whether or not it was a Comet or a Tempest?

A. Yes, I think I did.

Q. Then do you want to change what you just said? You said at one point that it was either a Comet or a Tempest, isn't that right?

(300) A. Yes.

Q. And you and Mr. Mullin had actually wagered. You said to one another you would bet which it was, did you not?

A. Yes, sir.

Q. You also asked a policeman about it at one point, didn't you?

A. Yes, sir.

Q. And your recollection is that he told you it was a Comet, or at one point that is your recollection, isn't that so?

A. I thought he told me—you mean when I first saw the car?

Q. What is your recollection as to what you said about what the policeman told you? Didn't you say to another person at another time and place that you thought the policeman said to you that it was a Comet?

A. I don't remember that, sir.

Q. Do you remember a time when a court reporter and an investigator came to talk to you about the case, and Mr. Mullin was present?

A. Yes, I do.

Q. That was on April 12th of 1967, was it not?

A. I don't remember the date, sir.

Q. Does this sound about right?

(301) A. April sounds right.

Q. Was it last spring?

A. Yes, sir.

Q. You were still in Cleveland last spring, were you not?

A. Yes, sir.

Q. While Mr. Mullin was being interrogated, do you remember chiming in and saying: "I think we asked somebody because I think we had a bet on whether it was a Tempest or a Comet. And I think the policeman said it was a Comet."

Do you recall that now?

* * * * *

A. I think I remember saying that.

Q. And there was a court reporter there taking it all down, wasn't there, sir?

A. Yes.

* * * * *

(302) Q. Did you at any time write down anything that Miss Burby asked you to write down?

A. I did not.

Q. Did anyone in your presence ever write down anything at the direction—

A. Yes, someone inside the house wrote the license plate number.

Q. Were you there?

A. Yes, I was there.

Q. Do you know what became of that slip?

A. No, I don't.

Q. Have you ever seen it since that night?

A. No, I never have.

Q. By the way, you gave a statement to the police, I (303) believe you said, is that right?

A. A statement, yes, sir.

Q. And you gave that on the day following the explosion, am I right?

A. Yes, sir.

Q. Have you seen that statement since?

A. No, I haven't.

* * * * *

MARTIN MULLIN, DIRECT.

(320) Q. Can you describe this man for the—

A. Yes. I saw him as being midde aged, about 58 or 59; rather stocky, with light brown hair.

* * * * *

MARTIN MULLIN, CROSS.

(343) Q. Do you recall saying this: "Camilla was the closest one and she was the only one that could really get it. And she shouted it out and we shouted it out after her. And Camilla and Michelle went in the house and wrote it down."

A. I recall saying that in reference to the fact that she was the only one that could see the entire license number.

* * * * *

(348) Q. Did you ever at any time say that it was a Comet?

A. The night of the accident my recollection of it was (349) that I thought it was a Comet, yes.

* * * * *

(350) Q. * * * See if you remember these questions and these answers:

"Could you see the name plate, 'Comet'?

"No, I recognize the car from the lines of the automobile. I don't remember looking at anything that said, 'Comet.'

"Question: From the fact that you knew what a Comet looked like, you know it was a Comet?

"Answer: Yes."

You were asked those questions and gave those answers on April 12 of 1967, didn't you?

A. That is the date you said that they questioned us, yes.

Q. And you gave those answers then, didn't you?

A. I believe so, yes.

JAMES SEWELL, DIRECT.

(496) Q. Before we go any further, was this room they were in attached to the police station or is it separate?

A. I would say it's about maybe 15 to 20 feet away from the station itself or where I came out of. You walk toward it, it's over on the right-hand side.

* * * * *

(497) Q. Now, about how far down the lot would you say you walked?

A. 25, 30 feet maybe.

Q. Did you walk rapidly or slowly?

A. No, I walked slowly in front of him. In fact, one time I even stopped a little bit and the patrolman gave me just a little shove to keep going. I said, "You don't think I'd run away from you?"

Q. What did he say?

A. He says, "If you do," he says, "I'll shoot you dead on the spot."

Q. And you did not run away?

A. No. Then also he come out with the gun.

* * * * *

CAPTAIN EARL J. GORDON, DIRECT.

(611) Q. Now, will you tell us what time on June 28, 1966 that you arrested Mr. Sewell?

A. Approximately 4:30 a.m.

* * * * *

(614) Q. Now, sir, what time was it that the police were first notified of the explosion?

A. 12:18 a.m.

Q. And what time did they arrive on the scene? The police, I mean.

A. I couldn't answer from personal knowledge, sir.

Q. Were you one of those who were there?

A. I was there, yes, sir.

Q. Would it be a matter of minutes later after the notification?

A. I presume so.

* * * * *

(619) Captain, when you arrived on the scene, you say you learned the license number?

A. I was told the license number.

Q. And it was not written down, you say, at any time?

A. I don't know that, sir.

Q. Who told you the license number?

A. The first time Detective Robert Stamberger.

Q. Did he have it in writing, to your knowledge?

A. Not to my knowledge, I don't know.

Q. Now, when you were told it, after that you implied that you heard it another time?

A. I heard the license number.

Q. Yes, another time. When was that?

A. In conversation with the Burby friends and the Burby girl.

Q. Did they have anything written down?

A. Not to my knowledge.

* * * * *

(621) Q. Your department has the motor listings, doesn't it, the so-called license number directory?

A. Yes, sir.

Q. And you have it for more than one county?

A. Yes, sir.

Q. You have it for Lake County?

A. Yes.

* * * * *

(624) Q. Well, Captain, can you tell us whether or not it is the fact that if the license is known to you and

you have that book, and the book is accurate, you can turn to it in a matter of minutes and determine the name of the owner of the car? You can do that, can't you?

A. Yes, if the name and the owner are accurate.

* * * * *

(626) Q. When did you get the address to which you ultimately went?

A. Approximately 3:40 a.m. I was furnished the correct address.

* * * * *

Q. Did you at any time go to a wrong address looking for the man whom you suspected?

A. No, sir.

Q. Never at any time?

A. No, sir.

Q. How did you determine that the address you had was incorrect?

A. I didn't personally determine it.

(627) Q. Well, do you know how it was determined that it was incorrect?

A. Yes, sir.

Q. All right, sir. How was it determined?

A. There was no such street bearing the number 37850 Midland Road in Willoughby, which appeared in the listing. This street did not exist.

Q. Did you then talk to the Willoughby police?

A. I didn't, sir.

Q. Did someone on your staff?

A. Yes, sir.

* * * * *

(638) Q. And it takes you how long to drive from—approximately how long did it take you on this day to drive from Cleveland Heights, once you had the infor-

mation that this home was under surveillance? How long did it take you to drive out there?

A. 20 minutes.

* * * * *

(644) Q. Where is Willoughby Hills in relationship to Willoughby, sir?

A. I am not positive of this. I think it is adjacent to Willoughby Hills, on the east end of Willoughby. Willoughby is on the east side of Willoughby Hills.

Q. You wouldn't have any trouble distinguishing an address of a suburb or the phone number of a suburb of the City of Cleveland, would you, if you were asked this kind of question by a police officer from Willoughby?

A. I don't know what you are referring to.

* * * * *

LIBRARY
REME COURT, U. S.

Office Supreme Court, U.S.
FILED
OCT 31 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 575.

JAMES R. SEWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney
of Cuyahoga County, Ohio,

WILLIAM J. COYNE,
Assistant Prosecuting Attorney,
Criminal Courts Building,
1560 East 21st Street,
Cleveland, Ohio 44114,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Objections to Jurisdiction 1

Statement of the Case 2

Questions Presented 6

Argument 7

I. Was the accused deprived of due process of law where

(a) witnesses to the bombing of a residence were taken to the police station to view a car,

(b) while in the police station they briefly glimpsed through a window a man walking outside the police station in the company of an officer,

(c) the witnesses recognized the man as the one they had seen at the scene of the bombing,

(d) the witnesses later separately identified the man in the line-ups as the one at the scene of the bombing,

(e) the witnesses made solid in-court identifications based on their on-the-scene observations 7

II. Was the petitioner deprived of due process of law and equal protection of the laws where a preliminary hearing was continued at the request of the prosecution, the petitioner was thereafter indicted by a grand jury, and the preliminary hearing was never thereafter resumed 13

III. Whether the denial of motions for pretrial discovery of all statements and notes of witnesses in the possession of the prosecution in a state case and for inspection of notes of a prosecution witness who testified at the trial constitutes a violation of due process 14

Conclusion ---------- 16

Appendix. Excerpts from Transcript of Trial Testimony ---------- 17

TABLE OF AUTHORITIES.

Cases.

Brady v. Maryland, 373 U.S. 83 ---------- 15

Costello v. United States, 350 U.S. 359, 100 L. Ed. 398 13

Foster v. California, ____ U.S. ____, 22 L. Ed. 2d ____, 89 S. Ct. 1127 ---------- 11

Gilbert v. California, 388 U.S. 263 ---------- 13

Giles v. Maryland, 386 U.S. 66 ---------- 15

Jencks v. United States, 353 U.S. 657, 1 L. Ed. 2d 1103 15

Polermo v. United States, 360 U.S. 343, 3 L. Ed. 2d 1287 ---------- 15

State v. Minamyer, 12 Ohio St. 2d 67 ---------- 13

State v. White, 15 Ohio St. 2d 146 ----------14, 15

United States v. Wade, 388 U.S. 218 ---------- 13

Statute.

Ohio Revised Code § 2907.081 ---------- 2

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 575.

JAMES R. SEWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without opinion. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

STATEMENT OF THE CASE.

An indictment charging the appellant James R. Sewell with maliciously placing a bomb (Ohio Revised Code 2907.081) was returned by the Cuyahoga County Grand Jury on July 14, 1966. The case was tried to a jury in the Common Pleas Court from September 18, 1967 to September 22, 1967. The jury returned a verdict of guilty as charged in the indictment.

The defendant was then sentenced to the Ohio State Penitentiary and fined $10,000.

The evidence disclosed that on June 28, 1966 at approximately 12:15 a.m. Mr. and Mrs. Charles Gard, were in bed in their residence, located at 2604 East Overlook Road, Cleveland Heights, Ohio, were awakened from their sleep by the noise of breaking glass in the living room area of their home. They got up and went to the bedroom window. Upon looking out the window they saw a car driving away from their home. At approximately the same time there was a heavy explosion in the first floor living room area of their home. Mr. and Mrs. Gard then left their home until the Cleveland Heights Police and Fire Departments arrived at the scene, when they reported what had happened.

Next door, at 2606 East Overlook to the east of the Gard residence, was the residence of Camilla Burby, a 19-year-old student at Rosemont College, who at the time of trial was in her sophomore year. She was entertaining friends on the rear patio of her home, among whom were Michelle Day, Brent Murphy, Marty Mullen, Charlotte Meers, Nancy Highland, Cindy Harper and a Mickey Champion.

The testimony of Miss Burby, together with that of Michelle Day, Brent Murphy and Marty Mullen, was that shortly after midnight they heard glass breaking in the

front part of the Gard residence. They ran down the Burby driveway toward East Overlook and while running they saw the defendant, James R. Sewell, running from the front of the Gard home toward his 1963 Chevrolet station wagon, which was parked, with the motor running, directly under a street light in front of the Gard residence.

These witnesses chased after Mr. Sewell. They were from 10 to 20 feet away from him when he stopped underneath the traffic light and looked directly at them before entering the driver's side of his car and driving away east on East Overlook. In so doing he passed the Burby residence.

With Miss Burby in the lead, the witnesses on foot chased the Sewell car up East Overlook. The car had its lights on, enabling Miss Burby to see the license number and shout it out to the others about her. She testified (R. 213-214):

> "A. Well, I continued to chase the car up the street until I got close enough to see the license number.
>
> Q. Do you recall what that license number was?
>
> A. Yes, I do.
>
> Q. What is that?
>
> A. RV 840.
>
> Q. What did you do when you saw this license number?
>
> A. I called it out."

As the witnesses walked back toward the Gard home there was an explosion blowing the front window of the Gard home asunder. They immediately ran into the Burby residence and called the Cleveland Heights Police Department.

Miss Burby gave the license number to the Cleveland Heights police when they arrived at the scene.

At approximately six o'clock on that same morning Michelle Day, Mickey Champion, and Marty Mullen were

taken to the Cleveland Heights Police Station. (Mickey Champion was not in the United States at the time of trial and did not testify.) The four students who testified all said that at the Cleveland Heights Police Station they identified the automobile of James R. Sewell as the one they saw leaving the front of the Gard home immediately after they heard the glass breaking.

While in the Cleveland Heights Police Station they were asked to look out a window. They saw a police officer and another man walking across the yard and they all recognized the man with the police officer as the man they saw running from the Gard home just before the explosion.

Each of the four students was called back to the Cleveland Heights Police Department later on in the day or early evening of June 28, 1966. Each separately viewed a lineup of five men. Each separately identified the petitioner, James R. Sewell, as the man they had seen running from the Gard home shortly after midnight. Each of the four students also identified the defendant in the courtroom as the man he or she saw running from the Gard home shortly before the explosion took place.

The Cleveland Heights Police Department, headed by Captain Earl J. Gordon, obtained a listing on license No. RV 840, the number given to them by Camilla Burby. That license was listed to the defendant, but on his Bureau of Motor Vehicles application Mr. Sewell had listed his address at 37850 Midland Drive, Willoughby, Ohio, when his address was actually 37850 Milann Drive, Willoughby Hills, Ohio. A copy of the Motor Vehicles Registration application was admitted into evidence as State's Exhibit 13.

Because of the erroneous address on the Bureau of Motor Vehicles application there was some delay in the

Cleveland Heights police arriving at the home of James R. Sewell. However, the defendant was arrested at his home early that same morning and taken to the Cleveland Heights Police Station, where he was identified by the aforementioned witnesses.

Fire inspector Robert Maver of the Cleveland Heights Fire Prevention Bureau testified as to the extent of damage caused by the explosion at the Gard residence. He testified that the damage was caused by the detonation of an explosive in the living room.

The defendant took the stand in his own behalf. He gave his occupation as a dredgeman and admitted that he had been convicted of robbery in 1941 and served time in the Mansfield Reformatory, and was again convicted of armed robbery in 1945 and served time in the Ohio State Penitentiary.

He testified that on the late evening of June 27, 1966 he left his home in Willoughby Hills and went to an apartment in Cleveland where his step-son, Jack resided. He stated the apartment was on East 107th Street behind the Greyhound Bus parking lot, south of Euclid Avenue.[1] He Claimed that it took him from one to one and a quarter hours to drive to his step-son's home, that he pulled into the parking lot next to his step-son's apartment, looked up to the particular suite, and seeing that his step-son's light was out, turned around, drove out of the lot and returned to Willoughby Hills without ever getting out of the car; that this was at approximately 10:30 p.m.

On cross-examination (R. 530) it was brought out that he did not know how many floors were in this apartment building, which window was in his step-son's suite; he had no idea how long the apartment building was or

---

[1] This address is less than two miles to the west of the scene of the bombing.

how many windows faced the parking lot. (R. 529-533.)

He said that he arrived back home at approximately 11:10 and proceeded to watch the news on television and a movie for about 15 minutes and then went to bed. He was awakened by the Cleveland Heights Police Department early in the morning when they came and arrested him and took him to the Cleveland Heights Police Station.

QUESTIONS PRESENTED.

The questions presented in the petition do not accurately present questions raised by the record. Respondent submits that the subject matter of petitioner's questions would be more properly stated as follows:

I. Was the accused deprived of due process of law where

(a) witnesses to the bombing of a residence were taken to the police station to view a car,

(b) while in the police station they briefly glimpsed through a window a man walking outside the police station in the company of an officer,

(c) the witnesses recognized the man as the one they had seen at the scene of the bombing,

(d) the witnesses later separately identified the man in line-ups as the one at the scene of the bombing,

(e) the witnesses made solid in-court identifications based on their on-the-scene observations.

II. Was the petitioner deprived of due process of law and equal protection of the laws where a preliminary hearing was continued at the request of the prosecution, the petitioner was thereafter indicted by a grand jury, and the preliminary hearing was never thereafter resumed.

III. Was the petitioner deprived of due process of law by the denial of motions for pretrial discovery of all statements and notes of witnesses in the possession of the prosecution and for inspection of notes of a prosecuting witness who testified at the trial.

ARGUMENT.

At the outset, it should be made clear that the excerpts from the trial record appended to the petition do not fairly reflect the totality of the circumstances surrounding the identification or the total atmosphere of the petitioner's trial.

I. Was the accused deprived of due process of law where

(a) witnesses to the bombing of a residence were taken to the police station to view a car,

(b) while in the police station they briefly glimpsed through a window a man walking outside the police station in the company of an officer,

(c) the witnesses recognized the man as the one they had seen at the scene of the bombing,

(d) the witnesses later separately identified the man in the line-ups as the one at the scene of the bombing,

(e) the witnesses made solid in-court identifications based on their on-the-scene observations.

Petitioner admits that the rule requiring the exclusion of identification evidence obtained in a line-up conducted in the absence of counsel does not have application in this case, but contends that the circumstance of his having been seen by witnesses while walking outside the police station are "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to

deny him due process. The record does not support his contention. The petition refers to a one-man lineup conducted by the police. This is a misstatement. There was no one-man line-up.

The testimony during the voir dire examination (R. 119-141) of Michelle Day, which was requested by defense counsel and which took place outside the hearing of the jury, clearly shows that the lineup identification was not fundamentally unfair to this defendant.

Michelle Day testified that at the time she identified the defendant at the Cleveland Heights police department, she was not even aware that she was going to view a possible suspect in connection with the bombing of the Gard residence. She testified, as did the other three witnesses later, that she was brought to the Cleveland Heights Police Department on the early morning of June 28, 1966 to view a car; and that after she identified the car as being the one that left the bombing scene she was taken into a room in the Cleveland Heights police station. While waiting in the room and without ever being told that she was going to be requested to identify anyone, a police officer in the room asked her to look out a window which faced the yard. She looked out the window and saw a policeman walking across the yard with a man whom she instantly recognized as the same man who ran from the Gard home earlier that morning. She so informed the police officer in the room at that time. The testimony of the other three identification witnesses was substantially the same.

Michelle Day and the other three witnesses returned to the Cleveland Heights police station later that same day and separately made statements to the Cleveland Heights police. They also separately viewed lineups in which there were five men. From the lineup each witness

separately identified the defendant James R. Sewell as the man they saw running from the Gard home early that morning.

The record at page 138 shows that there was no effort whatever made by the Cleveland Heights police department to influence the witnesses in their identification of the defendant.

The testimony of Miss Day on voir dire is as follows:

(R. 132):

"Q. Did they take you to a window and say, "Look in there"?

A. Yes.

Q. Did they point out the defendant to you?

A. Oh, no.

Q. What did they do?

A. They just said, "Do you see the man?"

Q. The man you saw this morning?

A. No, "Do you see the man you saw last night?"

Q. But you looked and saw the same man that you had seen that morning, right?

A. Yes."

(R. 138):

"Q. As you recall, the only thing that the officer in this room said to you was, 'Look out the window,' is that right?

A. Correct.

Q. Before you were put in that room, did anybody tell you you were brought in that room to identify anybody?

A. No, they did not.

Q. When you were brought down to that police station, for what reason did they ask you to come down there?

A. They told us they had gotten the car that they thought had been used the night before and would we identify it as the car.

Q. So you were brought down there to identify the car?

A. Correct.

Q. And when you were in the room, a police officer said to you 'Look out the window'?

A. Yes.

Q. Did he point anybody out to you?

A. No.

Q. When you saw this man what did you say?

A. I said, 'That's the man.' "

(R. 139):

"Q. All right. I believe you stated that—was there any difference as you observed him in the lot from where you observed him on Overlook Drive earlier that morning?

A. He had on different clothes the next morning.

Q. Any other difference?

A. He didn't have his glasses on.

Q. He had glasses on when you observed him in the early morning hours in front of the Gard residence, is that right?

A. Yes.

Q. When you saw him walking across the yard he did not have glasses on?

A. Yes.

Q. Did you call that to the attention of the officer there?

A. Yes."

(R. 140):

"Q. And then later on that evening the police officer took you to a room, I believe you said?

A. Yes.

Q. And you were asked to look through a window there and view a lineup wherein you identified the defendant in this case, is that right?

A. Yes.

Q. And he was in the lineup with four other men?

A. Yes.

Q. Did anybody tell you to point out this man. * * *

A. No.

Q. And those were the only two times that you have seen him in the morning, once in the parking lot, later on, in the later part of the day, in the lineup room, is that right?

A. Yes."

After the voir dire examination of Michelle Day the Court overruled the defense motion for suppression of her in-court identification. The Court stated:

(R. 142):

"The Court has well in mind the testimony of the captain, as well as that of this young lady who just testified. I think that the main issue is whether or not Mr. Sewell's constitutional rights were violated at the time of the so-called identifications.

It would appear that the witness would have had as much of an opportunity to say that is not the man as she would have had to say that that is the man. What the matter resolves itself to is whether or not the credibility of the witness can be taken."

Rather than have separate voir dire examinations of the three subsequent witnesses who also identified the defendant at the Cleveland Heights police station and in court, defense counsel (R. 222) reserved his right to raise the impropriety of the in-court identifications but stated that he would base it on his cross-examination in the presence of the jury.

Petitioner mistakenly asserts that the identification procedures in *Foster v. California,* _____ U.S. _____, 22 L. ed. 2d ____, 89 S. Ct. 1127 were "infinitely supe-

rior" to the treatment accorded petitioner. Here, unlike Foster, there was no lack of positive identification at any time; there was no tentative identification in a one-to-one confrontation between petitioner and any witness; the police never said, "This is the man"; there was no contrast between petitioner and the other men exhibited in the actual lineup; in sum, there were no suggestive elements making it all but inevitable that every one of the four witnesses would identify petitioner whether or not he was "the man" they saw running from the scene, entering a car, and driving away.

Petitioner is also mistaken in asserting that the State offered no evidence that he was in his car during the night in question. The witnesses identified him as the man they saw entering a car which bore his license number and driving away. The reliability of their testimony was a matter for the jury. The witnesses based their in-court identifications, as they did their lineup identifications, upon their views of the defendant at the scene of the crime. Any impression from the testimony of Brent Murphy quoted at page 28 of petition that his lineup identification resulted from seeing the man in the parking lot was cleared up by this witness on cross-examination when defense counsel asked (R. 306):

> "Q. At that time you were able to say, in the line-up, that this is the man I saw in the parking lot, were you not?
>
> A. Not at that time. I said, 'This is the man that I saw running, that looked up, at the car that previous time.' "

The point here is not whether there was any basis for the parking lot viewing; the point is whether it undermined the reliability of the in-court identification by the witnesses. Each witness testified that his in-court identifi-

cation was based on his view of "the man" at the scene of the crime on the night in question. (See appendix.)

There is no reason whatever to suppose that the conviction of the petitioner was brought about by anything other than the in-court testimony that the defendant was the man the witnesses observed at the scene. The totality of the circumstances establishes a complete absence of any identification procedures leading to the "irreparable mistaken identification'" condemned in *United States v. Wade,* 388 U.S. 218, and *Gilbert v. California,* 388 U.S. 263.

II. Was the petitioner deprived of due process of law and equal protection of the laws where a preliminary hearing was continued at the request of the prosecution, the petitioner was thereafter indicted by a grand jury, and the preliminary hearing was never thereafter resumed.

The essence of petitioner's contention appears to be that since some defendants in state courts receive full preliminary hearings, he was unfairly discriminated against.

Petitioner has not cited any decision affording a full preliminary hearing to an accused even though an indictment has been returned in the meantime. This Court has said that the rights of the accused were to be protected at trial. As stated by Mr. Justice Black, in *Costello v. United States,* 350 U.S. 359, 363, 100 L. ed. 398, 402: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The law in Ohio is well stated in *State v. Minamyer,* 12 Ohio St. 2d 67, in the first paragraph of the syllabus:

"The only purpose of a preliminary hearing is to determine whether sufficient facts exist to warrant the court in binding the accused over to the grand jury and to set bail, and once an indictment has been returned by the grand jury, a preliminary hearing before a magistrate is no longer necessary."

III. Whether the denial of motions for pretrial discovery of all statements and notes of witnesses in the possession of the prosecution in a state case and for inspection of notes of a prosecution witness who testified at the trial constitutes a violation of due process.

The decision in *State v. White,* 15 Ohio St. 2d 146, cited by petitioner considers (1) the denial of a motion—by the defendant for pretrial discovery of his oral and written statements and (2) the denial of a motion for inspection of statements of prosecution witnesses about which they had testified at the trial.

The Court upheld the denial of the defendant's motion for pretrial discovery, and stated that the Ohio rule has been as follows (15 Ohio St. 2d 159):

"Prior to the trial of a criminal case a court may properly refuse an application by defendant or his attorney to require a prosecuting attorney to submit for his inspection and examination a statement made by the defendant respecting the crime involved, reduced to writing and in the possession of the prosecuting attorney. *State v. Corkran,* 3 Ohio St. 2d 125, paragraph one of the syllabus. See, also, *State v. Sharp,* 162 Ohio St. 173, and *State v. Yeoman,* 112 Ohio St. 214."

As far as pretrial discovery is concerned it should be noted that in this case defense counsel had statements taken from two of the witnesses shortly after the bombing

and that he used them for cross-examination of witnesses Martin Mullen and Brent Murphy.

The controlling circumstances in *White* which the Court held would require an *in camera* inspection in the course of the trial are set forth in paragraph 3 of the syllabus: "Where the state's principal witness admits in open court that her testimony is inconsistent with some or all of her prior statements to the police, and, in addition, that these prior statements are inconsistent with each other * * *." Paragraph 4 of the syllabus commands an *in camera* inspection by the *trial court* to determine the existence of inconsistencies between the *testimony* of the prosecution's witnesses and their prior statements.

Nowhere in the petition herein is it asserted that any prosecution witness said on the witness stand that his testimony was inconsistent with any statement he had given to the police. At no time during the petitioner's trial was there any request by the defense for any *in camera* inspection by the court.

The holding in *Jencks v. United States,* 353 U.S. 657, 1 L. Ed. 2d 1103, that the government is required to produce for the defendant's inspection statements made by government witnesses relating to events and activities about which these witnesses testified at the trial, without a prior determination of their relevancy and materiality by the judgment, is not binding upon state courts. *Polermo v. United States,* 360 U.S. 343, 356, 3 L. Ed. 2d 1287.

There is no indication anywhere in this case of the deliberate, extensive repression of exculpatory evidence condemned in *Brady v. Maryland,* 373 U.S. 83, and *Giles v. Maryland,* 386 U.S. 66.

CONCLUSION.

Due Process of Law was never flouted in the trial of petitioner. Petitioner had an eminently fair trial before a fair and impartial court and jury and nowhere were any federal constitutional standards either misapprehended or misapplied. That the in-court identifications by four witnesses were tainted by the brief glimpse of the defendant in the police station lot is mere speculation nowhere sustained in the record. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

WILLIAM J. COYNE,
Assistant Prosecuting Attorney,
Attorneys for Respondent.

APPENDIX.

Transcript of Trial Testimony.

MICHELLE DAY, Direct.

(151) A. I was facing the car, and as he went around the back of the car he turned around and looked at me.

Q. He was facing you then?

A. Yes.

Q. For how long a period of time did you have a chance to observe him in this manner other than running down the drive?

A. Seven seconds under the street light.

(156) Q. Was there anything different about the defendant on the occasion when you observed him at the police station than when you observed him earlier in the evening in front of the Gard home?

A. Yes, he had on different clothes and he did not have his glasses on.

CAMILLA BURBY, Direct.

(212) Q. All right. As he came to the back of the car what, if anything, did he do?

A. As he was running around the back of the car he turned around and looked at me and at my friends.

Q. Now, the man that you have stated that you saw running from the Gard home and had stopped and looked at you under the street light there, do you see him in court today?

A. Yes, I do.

Q. Would you point him out for the Court and jury, please?

A. Right there.

(218) Q. And while up in this room was there anything else that you observed?

A. We were told to look out of the window.

Q. When you looked out the window what, if anything, did you see?

A. We saw two men walking from one building to the other, from one side of the building to the other.

Q. Did you identify either of those men?

A. Yes, I identified one as the man that is in the courtroom now, that I identified running from the Gard house the night before.

CAMILLA BURBY, Cross.

(226) Q. Now, was there anything distinctive, any mark, any particular thing, about the face that you saw of the man running down the lawn which makes it stick in your memory?

A. I would say that the thing that made this face stick in my mind was that as he turned to look at me, the shadows from the light above him kind of made his face very distinct to me. So that it was dark outside, and the thing, like a focal point, was his face.

(246) Q. Well, as a matter of fact, the officer said, "Look out there," or words to this effect, didn't he?

A. Words to this effect.

(252-53) Q. You were asked to go and see the man that you had also seen in the parking lot that morning?

A. No, they didn't say that.

Q. They didn't say that, but it was the same man?

A. It turned out to be the same man.

Q. When you got there you recognized the man whom you had seen in the parking lot, right?

A. And the man I had seen the night before.

(256) Q. And the policeman directed your attention to look out the window, right?

A. I think the policeman did. Either that or one of the other young people that I was with said, "Come here a second."

(265) Q. You are quite clear that you did or you think you shouted something as you ran down the lawn?

A. I don't remember. The only thing I remember from that night vividly is the license number and the face of a man under a street light.

Q. Now—

A. Those are the things that stick in my mind.

BRENT MURPHY, Direct.

(283) Q. You say you heard somebody shout something just as he was getting in the car?

A. Yes.

Q. When you say he looked up, which direction was he looking?

A. He was looking towards us.

MARTY MULLIN, Direct.

(319) A. When I saw him run, we started to pick up our pace. Someone hollered for him to stop. He stopped, turned around, glanced at us and kept running around the car, got in and drove away.

(324) Q. After you identified this automobile, what did you do then?

A. I went into a room along with the others and as I was in the room, I looked out the window. I saw the man I saw running across the Gard lawn the night before.

(325) Q. Did you identify any one of them in the lineup?

A. Yes, I did.

Q. Whom did you identify?

A. I identified the man sitting over there, the man I saw running across from the Gard home.

(326) A. I identified the man running across the lawn of the Gard home the night before.

MARTY MULLIN, Cross.

(355) Q. And the police officer inside the room with you called your attention and said, "Look out there," or something to that effect, did he not?

A. That's right.